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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 69.

JESSE MILLER SINCLAIR,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE*

EMANUEL REDFIELD,
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60 Wall Street,
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THE COURT PRESS, N. Y. C.

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Motion of the American Civil Liberties Union for Leave to File a Brief as *Amicus Curiae*.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the American Civil Liberties Union, is an organization of many thousands of members devoted to the protection of the civil liberties guaranteed in the Constitution. It is interested in filing a brief as *amicus curiae* in the above entitled appeal because important questions of freedom of speech are involved.

The reason this motion is made at this date is that on June 16, 1949 the petitioner in person had requested the American Civil Liberties Union to file a brief on his behalf. Therefore, it was not expected that there would be any difficulty. Thereafter, a stipulation to file was sent to petitioner's attorney.

Nothing was heard from him although follow-up letters were sent. On November 2, 1949, petitioner's counsel informed the American Civil Liberties Union that he would not consent. The Solicitor General, however, by telephone, on November 2, 1949, stated that he had no objection to the filing of this brief.

Since there are civil liberties issues involved that are important, it is urgent that this motion be granted. The brief is hereto annexed.

Dated: New York, New York, November 2, 1949.

AMERICAN CIVIL LIBERTIES UNION,
By: EMANUEL REDFIELD,
Of Counsel.

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Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE.*

Facts.

The facts in this case are simple. Petitioner is charged with a violation of Section 1461, Title 18, U. S. C. A., in that, as the indictment charges, he deposited and caused to be mailed a certain writing which was obscene and which was addressed to his wife. The writing appears as Government Exhibit 1. He was convicted and sentenced to a year and a day for this offense.

Argument.

The statute does not apply to communications of the character charged in this case.

POINT I.

The statute is not applicable to the writing that was mailed.

The statute reads as follows:

> "Section 1461. MAILING OBSCENE OR CRIME-INCITING MATTER.
>
> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; . . . is declared to be non mailable matter and shall not be conveyed in the mails or delivered through any post office or by any letter carrier. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be non mailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

It should be noticed that the indictment charged the petitioner with mailing an "obscene, lewd and lascivious letter and writing." It did not charge him with mailing a "filthy" letter. This is important, because "filthy" writings are in a different category. "Filthy" writings have been held by this Court to be a separate crime from "obscene, lewd and lascivious" ones. In *United States* v. *Limehouse*, 285 U. S. 424, this Court held that the word "filthy" was added to the statute after this Court held in *Swearingen* v. *United States* (1896), 161 U. S. 446, that "obscene, lewd and lascivi-

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ous" referred to sexual lust only and was the type of writing whose tendency was to corrupt the minds and morals of the persons into whose hands the writing might fall.

It should be noticed that the *Swearingen* case was followed in the recent case of the Mormon publication urging plural wives. *United States* v. *Barlow*, 56 F. Supp. 795, appeal dismissed 323 U. S. 805.

Since the complex question concerning the vagueness of the definition of "filthy" (*Winters* v. *New York*, 333 U. S. 507), and the separation of the crimes (*Stromberg* v. *California*, 283 U. S. 359) is not before the Court, the question takes on simpler aspects.

Is the writing, therefore, "obscene, lewd, and lascivious"? Under the test of the *Swearingen* case it is not. In that case a newspaper in abusive terms, such as "mental and physical bastard" libelled a person. This Court held that although the terms were coarse and vulgar, nevertheless, they were not "obscene, lewd and lascivious" within the definition of the statute. The Court held that although the three words are written disjunctively, nevertheless they were regarded as one. They collectively represent the same thing as "obscenity" at common law criminal libels, to wit, words that incite sexual lust and tend to corrupt the minds and morals of the persons in whose hands they may fall.

Bringing these principles to petitioner's case, we find that the words whether used as inquiry to his wife as to her moral looseness or whether to make inquiry into her medical status, nevertheless, have in their text no connotation of exciting sexual lust. They are words of vituperation hurled by an angry, impassioned hus-

band against a wife's sexual indiscretions. He might have used finer language but the circumstances militate against him.

In any event the letter does not arouse lust by any construction placed on it by reasonable minds (*Knowles* v. *United States* (8 Cir.), 170 Fed. 409, 410).

The likelihood is that in this case there could not be any arousing of lust because this letter was sent by petitioner to his own wife in a sealed envelope. It has been held that sending a letter in the mail to oneself is not within the statute. *United States* v. *Reinheimer*, 233 Fed. 545. Sending a letter to one's wife comes pretty close to the same doctrine.

It is, therefore, shocking to note that this petitioner received a prison sentence of a year and a day for having sent a coarse note in a sealed envelope to his wife.

POINT II.

The conviction should be reversed and the indictment dismissed.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for American Civil Liberties Union.

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